IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO.517 OF 2005
IN
SUMMARY SUIT NO.3082 OF 2004

Iram Feroz of Bombay .
Indian inhabitant residing at .
901, Sheil Towers .
Yari Road, Varsova .
Mumbai-400 061. ....Plaintiff

V/s.

Ayaz Gadhiya of Bombay .
Indian inhabitant carrying .
on business in the firm name .
and style of Century Foods, .
as proprietor thereof having .
its office at : 34, .
Rehamatbai Habib House, .
2, Nowrosjee Hill Road .
Dongri, Mumbai - 400 005. .
And .
Factory at : .
Sher Baug, Panchgani-421 805 ....Defendant

Mr.Dilip A. Shinde for the Plaintiff.

Mr.D.J. Lulia for the Defendant.

CORAM : S.J. VAZIFDAR, J.
DATED : 14TH DECEMBER, 2005.

ORAL JUDGMENT :

1. The suit is filed to recover the amounts lent and advanced by the Plaintiff to the Defendant. The suit is based on a dishonoured cheque. The cheque was issued by the Defendant towards the repayment of the

said amount.

2. The Defendant admits that the loan was advanced. The Defendant admits that he issued the cheque towards the repayment and that the same was dishonoured.

3. Two defences were raised. It was contended that the entire amount had been repaid. It was also contended that the suit is not maintainable as a Summary Suit.

4. The payment by cheques referred to by the Defendant are each in the sum of Rs.4500/- paid half yearly. This does not evidence repayment of the principal amount. It in fact evidences an agreement on the part of the parties for interest at 18% per annum. In paragraph 11 of the reply, the Defendant has also contended that he paid an aggregate sum of Rs.27,500/-. There is no evidence whatsoever to substantiate the same. There was no reply to the Plaintiff’s advocate notice demanding payment. This defence has been raised for the first time.

5. The first defence is thus without any substance.

6. Mr.Lulia, the learned counsel appearing on behalf of the Defendant contended that a suit even on a dishonoured cheque is not maintainable as a summary suit as cheques are not included within the provisions of Order 37 Rule 1 sub-rule 2 of the Code of Civil Procedure which reads as under :-

> "(2) Subject to the provisions of sub-rule (1), the Order applies to the following classes of suits, namely -
>
> (a) suits upon bills of exchange, hundis and promissory notes ;
>
> (b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising, -
>
> (i) on a written contract ; or
>
> (ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty ; or
>
> (iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only."

7. The submission is unfounded. The terms "bill of exchange" and "cheque" are not defined in the Code of Civil Procedure. The terms must derive their meaning from the Negotiable Instruments Act. Section 6 of the Negotiable Instruments Act reads as under :-

> "6. "Cheque" - A "cheque" is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form.
>
> Explanation I. - For the purposes of this section, the expressions -
>
> (a) "a cheque in the electronic form" means a cheque which contains the exact mirror image of a paper cheque, and is generated, written and signed in a secure system ensuring the minimum safety standards with the use of digital signature (with or without biometrics signature) and asymmetric crypto system ;
>
> (b) "a truncated cheque" means a cheque which is truncated during the course of a clearing cycle, either by the clearing house or by the bank whether paying or receiving payment, immediately on generation of an electronic image for transmission, substituting the further physical movement of the cheque in writing.
>
> Explanation II.- For the purposes of this section, the expression "clearing house" means the clearing house managed by the Reserve Bank of India or a clearing house recognised as such by the Reserve Bank of

India."

8. Thus a cheque is a bill of exchange and a suit based on a dishonoured cheque is maintainable as a Summary Suit.

9. In *Purnima Jaitly v. Ravi Bansi Jaisingh (2003) 11 LJ SOFT 50 = AIR 2003 Bombay 494,* it was held that the suit was not maintainable as a Summary Suit. The same was filed to recover the amounts lent and advanced by the Plaintiff to the Defendant and was based on a cheque issued by the Plaintiff to the Defendant. It is important to note however that the position in the present case is entirely different. The Plaintiff has not based the suit on the cheque issued by him in respect of the amount lent and advanced to the Defendant. The present suit is filed on the basis of the cheque issued by the Defendant to the Plaintiff towards repayment of the loan. In fact the observations in the aforesaid judgments not only clarify this position but also support the proposition that a suit is maintainable as a Summary Suit if it is filed on a dishonoured cheque issued by the Defendant. After setting out Order 37 Rule 1 (2) the learned Judge held as under in paragraph 4 :-

> . "It is not disputed that the suit is not based on a written contract nor is based upon an enactment or on a guarantee and is therefore not covered by clause (b) of sub-rule 2 of Order XXXVII of the Code of Civil Procedure. Learned counsel however, submits that the suit is covered under clause (a) of sub-rule 2 of Rule 1 of Order XXXVII of the Code of Civil Procedure. He submits that the cheque is a bill of exchange drawn on a bank as money was advanced to the defendant by a cheque i.e. bill of exchange, the suit is based upon a bill of exchange and is maintainable as a summary suit. I am unable to agree. It is true that a cheque is a bill of exchange, a special type of bill of exchange which is drawn on a bank. However, a suit upon a cheque (bill of exchange) means a suit to recover money due on a cheque (bill of exchange) drawn by the defendant, which is dishonoured. The suit must be for recovery of money of a cheque drawn in favour of or endorsed to the plaintiff. A suit for recovery of a loan which was advanced by the plaintiff by a cheque is not a suit upon a cheque or a bill of exchange and as such is not maintainable as a summary suit. Therefore, contention of the plaintiff that present suit is upon a bill of exchange is rejected." (emphasis supplied)

. The above observations clearly establish that a suit on a dishonoured cheque issued by the Defendant in favour of the Plaintiff is maintainable as a Summary Suit.

10. In *Syed Moosa Emami v. Sunil Kumar AIR 1982*

Delhi 590, the Plaintiff had filed a suit to recover money lent and advanced by him to Defendant No.1. The Plaintiff relied upon a cheque issued by him to Defendant No.1. There was no cheque issued by the Defendant in the Plaintiff's favour. In these circumstances, the learned Judge held as under :-

> "7. The arguments of learned counsel is that his suit is on the basis of cheques. The 'cheque' is certainly a bill of exchange. <u>But this suit is not based on 'cheque' because there is no cheque in favour of the plaintiff</u>. The suit is in fact based on loan transaction. When somebody files a suit on the basis of bill of exchange, hundies or promissory notes the documents are annexed with the plaint and are drawn in favour of the plaintiff or endorsed in his favour. Here the cheques on the basis of which the suit is allegedly filed has already been honoured by the bankers of the plaintiff and were in favour of the defendant - respondents and the money was utilised by the defendants. Such a suit cannot be called a suit based upon a cheque." (emphasis supplied)

. The above observations also do not suggest that a suit on a dishonoured cheque is not maintainable as a Summary Suit.

11. In support of his contention, Mr.Lulia relied upon the judgments in the case of - *Hydraulic and General Engineering Ltd. and Anr. .v. UCO Bank,*

1998 ILJ 793 and *Mafatlal Finance Limited .v. Express Industrial Services Pvt.Ltd., 2000 (1) Bom.C.R. 204.* The judgments are of no assistance regarding the question of maintainability of the suit as a Summary Suit.

12. In the circumstances, the Summons for Judgment is made absolute and the suit is decreed as prayed with costs.

. Refund as per rules.

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DATE OF DECISION : 14TH DECEMBER, 2005

For Approval and Signature :

HON'BLE MR.JUSTICE S.J. VAZIFDAR.

1. Whether Reporters of Local Papers may be allowed to see the judgement ?)

2. To be referred to the Reporter or not ?)